93-248

No. ____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

SHARON JOHNSON,
Petitioner,

v.

DONNA SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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August 16, 1993

COPY

QUESTIONS PRESENTED

1. In order to establish a claim of constructive discharge under the federal statutes prohibiting discrimination in employment, is it necessary for a plaintiff to prove not only that a reasonable person in the plaintiff's position would have regarded the working conditions as intolerable, but also that the employer acted with a "deliberate intent" to force the plaintiff to quit?

2. Is direct evidence of a deliberate intent to force an employee to resign required in order to prove a claim of constructive discharge under the Rehabilitation Act of 1973, 28 U.S.C. § 701 *et seq.*, whenever a federal employer makes some partial effort to accommodate the employee's disability?

LIST OF PARTIES

The parties in these consolidated appeals were Dr. Sharon Johnson, appellant in Nos. 92-1815 and 92-1846, and Donna Shalala, Secretary of the Department of Health and Human Services, appellant in Nos. 92-1109 and 92-1816.[1/]

[1/] The Washington, D.C. Council of Lawyers participated as an *amicus curiae*, in Nos. 92-1815 and 92-1846, regarding certain attorneys' fees issues that were rendered moot by the Fourth Circuit's disposition of the case.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit, reported at 991 F.2d 126, is reprinted in Appendix A at pp. 1a-11a. The panel's order denying rehearing is reprinted in Appendix B at pp. 12a-14a. The district court's unpublished opinion and order entering judgment in favor of petitioner are reprinted respectively in Appendix C at pp. 15a-42a and Appendix D at pp. 43a-44a.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was released on April 20, 1993. On May 4, 1993, petitioner filed a petition for rehearing and suggestion for rehearing en banc, which was denied on May 17, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES INVOLVED

This case involves the proper interpretation of 29 U.S.C. §§ 791, 794, which are reproduced in Appendix E, at pp. 45a-50a.

STATEMENT OF THE CASE

Beginning in August 1985, petitioner, Dr. Sharon Johnson, sought from her employer, the National Institutes of Health (the "NIH"), modifications in her daily work schedule to accommodate her disabilities. After repeatedly failing to obtain any significant accommodation of her disabilities during the course of an entire year, petitioner resigned her employment under protest on August 20, 1986. Pet. App. 3a-7a, 18a-28a. Petitioner thereafter brought this suit, claiming that she had been "constructively discharged" from her position at NIH.

Following a bench trial, the district court found that NIH violated 29 U.S.C. § 701 *et seq.* by failing reasonably to accommodate petitioner's disabilities. Pet. App. 36a-38a. The district court also found that Dr. Johnson was subjected to intolerable working conditions that eventually forced her to terminate her employment. Pet. App. 37a-38a. Consistent with the Fourth Circuit's precedent, the district court then analyzed whether NIH acted with "deliberate intent" to cause petitioner to resign her employment, and found that such intent existed, based on its subsidiary factual findings that: (1) NIH had suggested that Dr. Johnson consider disability

retirement in its response to her initial request for accommodations, (2) her NIH supervisor prepared a false performance evaluation to support a determination of eligibility for disability retirement, and (3) NIH took no significant steps to accommodate Dr. Johnson's disabilities. Pet. App. 37a-38a.

The NIH noted a timely appeal to the U.S. Court of Appeals for the Fourth Circuit, seeking review only of the finding that the NIH had deliberately intended to cause Dr. Johnson's resignation. Pet App. 8a. Accordingly, the NIH declined to seek review of the findings that Dr. Johnson's disabilities were not reasonably accommodated or that the repeated failure to accommodate her disabilities created intolerable working conditions. *See id.*

On appeal, the Fourth Circuit accepted the district court's subsidiary findings, but held as a matter of law that NIH's partial (but inadequate) efforts to accommodate petitioner's disabilities precluded a finding of "deliberate intent" to force Dr. Johnson to resign. "The evidence here is insufficient to show a deliberate intent to discharge an employee when there has been an attempt to accommodate that same employee, even though the accommodation falls short of [what is required by] the Rehabilitation Act." Pet. App. 10a.

The Fourth Circuit expressed the fear that the district court's approach "threatens to convert every failure to accommodate under the Rehabilitation Act into a potential claim for constructive discharge." Pet. App. 9a. Thus, the Court of Appeals held that to prevail on a constructive discharge theory, an employee with a disability whose employer has offered partial or ineffective accommodations must present direct evidence that the employer deliberately intended to force the employee to resign. Pet. App. 11a.

REASONS TO GRANT THE PETITION

1. This Case Presents An Important Question of Federal Law On Which The Circuit Courts Have Reached Inconsistent Results

There is a sharp split among the circuits as to the proper standard for establishing a constructive discharge in employment discrimination cases.[1/] Three distinct and inconsistent approaches have been followed by various circuits.

Most courts of appeals do not require a plaintiff to show that the employer harbored a "deliberate intent" to force the employee to resign in order to establish a constructive discharge.[2/] In these circuits, "[t]he focus is upon the rea-

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[1/] A "constructive discharge" occurs when an employee as a practical matter is forced to resign. The application of the constructive discharge doctrine generally does not vary depending on the employment statute that is at issue; the same rules apply for establishing a constructive discharge regardless of the particular statute at issue. *Gray* v. *York Newspapers, Inc.*, 957 F.2d 1070, 1079 n.5 (3rd Cir. 1992) ("the doctrine of constructive discharge is the same in all employee discrimination claims"); *see also Goss* v. *Exxon Office Sys. Co.*, 747 F.2d 885, 887 (3rd Cir. 1984) (explaining that federal courts borrowed the constructive discharge doctrine from labor law and listing cases that apply the constructive discharge doctrine across various civil rights statutes).

[2/] *Hopkins* v. *Price Waterhouse*, 825 F.2d 458, 472 (D.C. Cir. 1987) ("a number of cases . . . have rejected the notion that the employer must have the specific intent of forcing the employee to quit"), *rev'd on other grounds*, 490 U.S. 228 (1989); *Watson* v. *Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987) ("plaintiff need not show that the employer subjectively intended to force the employee to resign"); *Derr* v. *Gulf Oil Corp.*, 796 F.2d 340, 343-44 (10th Cir. 1986) ("an employer's subjective intent is irrelevant"); *Goss* v. *Exxon Office Sys., Inc.*, 747 F.2d at 887-88 ("[w]e hold that no finding of a specific intent on the part of the employer to bring about a discharge is required for the application of the constructive discharge doctrine"); *Pittman* v. *Hattiesburg Mun. Separate School Dist.*, 644 F.2d 1071, 1077 (5th Cir. 1981) ("[t]he employee . . . does not have to prove it was the employer's purpose to force the employee to resign"); *see Aviles-Martinez* v. *Monroig*, 963 F.2d 2, 6 (1st Cir. 1992) (holding that a plaintiff must demonstrate that her working conditions in (continued...)

sonable reaction of the employee [to her working conditions]; it is not necessary to show that the employer subjectively intended to force a resignation." *Junior* v. *Texaco, Inc.*, 688 F.2d 377, 379 (5th Cir. 1982). Thus, the finder of fact is under no obligation "to divine the state of mind of the employer." *Bourque* v. *Powell Elec. Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980). Under this standard, the employee need show only that he or she was faced with working conditions under which "a reasonable person in the employee's position and circumstances would have felt compelled to resign." *Pittman*, 644 F.2d at 1077.

Taking a markedly different approach, at least two other courts of appeals, including the court below, require a plaintiff to show that the employer possessed a "deliberate intent" to force the employee to resign in order to establish a constructive discharge. In these circuits, if the employee fails to show that the employer possessed a "deliberate intent" to force the employee to resign, no constructive discharge claim can be sustained.[3/]

[2/](...continued)
continued employment "would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign," without requiring any showing regarding the employer's subjective intent); *Greenberg* v. *Hilton Int'l Co.*, 870 F.2d 926, 936 (2d Cir. 1989) (same); *Buckley* v. *Hospital Corp. of America, Inc.*, 758 F.2d 1525, 1530-31 (11th Cir. 1985) (same); *see also Brooms* v. *Regal Tube Co.*, 881 F.2d 412, 423-24 (7th Cir. 1989) ("[w]e agree with the district court's decision to adopt a test which focuses upon the impact of [the employer's] actions upon a reasonable person"); *cf. Daniels* v. *Essex Group, Inc.*, 937 F.2d 1264, 1272 (7th Cir. 1991) (holding that liability for a constructive discharge exists when an employer "knew or had reason to know about the existence of intolerable working conditions" and "fails to take appropriate remedial action").

[3/] *See Holsey* v. *Armour & Co.*, 743 F.2d 199, 209 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985); *Johnson* v. *Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981).

The Sixth Circuit has opted for still another approach, under which a plaintiff must show both that the working conditions were intolerable and that there was some "aggravating factor." *See Yates* v. *Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987); *Henry* v. *Lennox Indus., Inc.*, 768 F.2d 746, 752 (6th Cir. 1985). In the Sixth Circuit, "deliberate intent" could serve as the "aggravating factor," but would probably not be a prerequisite to proving a constructive discharge. *See*, *e.g.*, *Yates*, 819 F.2d at 637.

Thus, at present there are three different and competing versions of the law of constructive discharge. In consequence, a plaintiff's ability to recover for a constructive discharge under the Rehabilitation Act and other federal employment discrimination statutes such as Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.*, will turn in many cases on which circuit's law applies. The impact of this conflict between the circuits is particularly apparent here because, according to the standards set forth in the majority of circuits, Dr. Johnson set forth a viable claim of constructive discharge. The only finding at issue on appeal was the determination that NIH had acted with deliberate intent; the finding that intolerable working conditions existed was neither challenged nor disturbed on appeal. The findings left unchallenged here would have sufficed in most circuits, therefore, to sustain a claim of constructive discharge.

Moreover, this difference in legal standards among the circuits by which constructive discharge claims are assessed is critical to the effectiveness of the protections afforded by the disability laws. One of the primary purposes of the Rehabilitation Act was to ensure that persons with disabilities were not unnecessarily precluded or forced from employment

because of their disabilities.[4/] Congress passed the Rehabilitation Act to remedy the "glaring neglect" of the disabled. 118 Cong. Rec. 526 (1972) (Statement of Sen. Percy). The framers of the Act recognized that the nation no longer could "tolerate the invisibility of the handicapped in America." 118 Cong. Rec. 525-526 (1972) (Statement of Sen. Humphrey). As this Court has noted, "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to prescribe only conduct fueled by a discriminatory intent." *Alexander* v. *Choate*, 469 U.S. 287, 296-97 (1985). To achieve the remedial purposes that led Congress to pass the Rehabilitation Act, "harms resulting from action that discriminated by effect as well as by design" must be rooted out. *Id.* at 297.

An employer that is insensitive to the needs of an employee with a disability will in many cases cause the same injuries to a disabled employee as does an employer who intentionally seeks to force disabled employees to resign. In both cases, the disabled employee may be forced to resign in order to escape intolerable working conditions. Accordingly, the constructive discharge standard used by the Fourth and Eighth Circuits is inconsistent with the policy of eliminating the barriers that the disabled must overcome in order to enjoy full participation in the federal workplace. *See* Pet. App. 10a-11a; *cf. Aviles-Martinez*, 963 F.2d at 6; *Brooms*, 881 F.2d at 423; *Greenberg*, 870 F.2d at 936; *Hopkins*, 825 F.2d at 472; *Watson*, 823 F.2d at 361; *Derr*, 796 F.2d at 343-44; *Buckley*, 758 F.2d at 1530-31; *Goss*, 747 F.2d at 887-88; *Pittman*, 644 F.2d at 1077.

[4/] Indeed, "[t]he legislative history of the Rehabilitation Act 'demonstrates that Congress intended that the federal government be a model employer of the handicapped.'" *Carter* v. *Bennett*, 840 F.2d 63, 65 (D.C. Cir. 1988) (*quoting Gardner* v. *Morris*, 752 F.2d 1271, 1280 (8th Cir. 1985)); *see also Southeastern Community College* v. *Davis*, 442 U.S. 397, 410 (1979).

Moreover, the Fourth Circuit has imposed an evidentiary burden that is unnecessarily great. As most circuit courts have held, an employer who creates intolerable working conditions which it fails to correct demonstrates that it intends to force the resignation of employees afflicted by the intolerable conditions. *See Derr, 796 F.2d at 344*; *Bourque, 617 F.2d at 65*. No more should be necessary. The logical consequences of an employer's action, or inaction, should be sufficient to support a constructive discharge claim, just as they will suffice to establish intent for other claims under the civil rights acts. *See Furnco Constr. Co.* v. *Waters*, 438 U.S. 567, 577 (1978); *see also Kent by Gillespie* v. *Derwinski*, 790 F. Supp. 1032, 1040-41 (E.D. Wash. 1991).

If allowed to stand, the decision below will create a major impediment to the full implementation of the Rehabilitation Act, and may also have a significant and adverse effect on the implementation of other employment discrimination laws. "[A] stringent requirement that an employer's intent be shown is 'inconsistent with the realities of modern employment.'" *Nolan* v. *Cleland*, 686 F.2d at 806, 814 n.17 (9th Cir. 1982) (*quoting Bourque* v. *Powell Electrical Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980)). The courts of appeals are divided on the question whether a showing of deliberate intent is a mandatory element of a constructive discharge claim. In these circumstances, guidance from this Court is both necessary and appropriate.

2. The Fourth Circuit's Decision Inappropriately Requires "Direct Evidence" Of "Deliberate Intent"

In addition to reaffirming its requirement that deliberate intent be proved to establish a constructive discharge claim, the Fourth Circuit also held that, as long as an employer makes some effort to accommodate an employee's known disabilities, only direct evidence of deliberate intent to force the employee's resignation will suffice to support a construc-

tive discharge claim. Pet. App. 11a. This holding sets an evidentiary requirement for claims of constructive discharge under the disability laws that is so elevated as to render such claims beyond reach in all but the rarest cases. In reaching this holding, the Fourth Circuit stands along in immunizing from liability employers who take partial, ineffective steps toward resolving a civil rights violation.[5/] The Fourth Circuit's decision presents an important question of federal employment law, about which this Court should provide guidance.

Even assuming *arguendo* the propriety of requiring a showing of deliberate intent, the Fourth Circuit's decision to reject the district court's finding of deliberate intent is in error. There was ample circumstantial evidence from which a trier of fact could infer a deliberate intent on the part of NIH officials to get rid of petitioner. In fact, that is precisely the inference drawn by the district court based on undisputed evidence of such facts as: (1) NIH's initial response to petitioner's request for accommodation included a "suggestion" that she apply for disability retirement, and (2) her immediate supervisor prepared a false performance evaluation with a crude attempt to forge petitioner's signature, ostensibly to "help" plaintiff qualify for disability retirement benefits. Pet. App. 18a-19a, 25a-26a, 37a-38a.

But instead of sustaining the district court's inference, the Fourth Circuit held that evidence of a partial failure to accommodate a disability, even when such action leaves in place intolerable working conditions, defeats a finding of

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[5/] Although the Eighth Circuit concurs in the Fourth Circuit's "deliberate intent" requirement, we have found no circuit court decision, other than the decision below, that largely immunizes from liability employers who take partial, ineffective steps toward resolving a civil rights violation. *Cf. Smith* v. *Cleburne County Hosp.*, 870 F.2d 1375, 1380-81 (8th Cir.), *cert. denied*, 493 U.S. 847 (1989); *Johnson* v. *Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981).

deliberate intent, in the absence of "direct evidence" of impermissible intent.[6] Pet. App. 10a-11a.

The decision below departs significantly from the standard previously established by even the Fourth Circuit for protecting against constructive discharge.[7] More importantly, the decision below is inconsistent with this Court's ruling in the employment discrimination context that employers may fairly be assumed to have intended the natural consequences of their actions or inactions. *Furnco Constr. Co.* v. *Waters*, 438 U.S. 567, 577 (1978) ("more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting").

The practical consequence of the decision below is clear. "It would be a rare case indeed in which a hostile discriminatory purpose or subjective intent to discriminate solely on the basis of handicap could be shown."[8] *Pushkin* v. *Regents of*

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[6] Previously, the Fourth Circuit had held that "[i]ntent may be inferred through circumstantial evidence, including a failure to act in the face of known intolerable conditions." *Bristow* v. *Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985). Thus, although the Fourth Circuit prior to *Johnson* had required civil rights plaintiffs to show that their employer possessed a "deliberate intent" to force them to resign in order to establish a constructive discharge, it allowed such plaintiffs to meet this burden by showing the existence of intolerable working conditions. *Id.*

[7] *See Holsey* v. *Armour & Co.*, 743 F.2d at 209 (holding that deliberate intent may be inferred from the existence of intolerable working conditions).

[8] Moreover, the Fourth Circuit's concern that affirming the district court's judgment would "threaten[] to convert every failure to accommodate" into a constructive discharge claim is misplaced. Pet. App. 9a. An employer's failure to accommodate an employee's disability would support a claim of constructive discharge *only* if the employee's working conditions are intolerable, and remain intolerable as a result of the employer's failure to provide effective accommodations. Often this will not be the case. A failure reasonably to accommodate a disabled employee's desire for a promotion, for example, will support a claim under the Rehabilitation Act, *see Prewitt* v. *United States Postal Serv.*,

(continued...)

the Univ. of Colorado, 658 F.2d 1372, 1385 (10th Cir. 1981).

In effect, the Fourth Circuit has significantly weakened the incentive for employers to comply fully and effectively with the requirements of the Rehabilitation Act and other statutes prohibiting discrimination in employment. *See generally Boze* v. *Branstetter*, 912 F.2d 801, 804 (5th Cir. 1990). This result is inconsistent with the mandate of the Rehabilitation Act, implicates an important question of federal employment law, and therefore should not be permitted to stand.

CONCLUSION

This petition should be granted in order to resolve important and recurring legal issues arising under the Rehabilitation Act of 1973 and other statutes prohibiting employment

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[8/](...continued)
662 F.2d 292, 307-09 (5th Cir. 1981), even though denials of promotions standing alone rarely if ever are sufficient to support a claim of constructive discharge. *See Bourque*, 617 F.2d at 65-66; *cf. Satterwhite* v. *Smith*, 744 F.2d 1380, 1383 (9th Cir. 1984) (finding a constructive discharge where employer refused to promote employee and other aggravating circumstances were present); *Clark* v. *Marsh*, 665 F.2d 1168, 1174 (D.C. Cir. 1981) (same).

discrimination, including an issue as to which there is a split among the Circuit Courts of Appeals.

Respectfully Submitted,

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